IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN and GAIL SUTTON, ET AL.	:	CIVIL ACTION
	:	
v.	:	
	:	
WEST CHESTER AREA SCHOOL DISTRICT, ET AL.	:	NO. 03-3061

MEMORANDUM

Padova, J. **May 5, 2004**

Plaintiffs, John and Gail Sutton, have brought this action on their own behalf, and on behalf of their minor daughter, Danielle Sutton, pursuant to 42 U.S.C. § 1983, 29 U.S.C. § 794, 42 U.S.C. § 12101 *et seq.*, and state common law against the West Chester Area School District (the "School District"), Dr. Lee McFadden, Dr. William Duffy, Dr. Alan Elko, and Karen Smith. Plaintiffs allege that Defendants' attempt to enter into a Service Agreement pursuant to Section 504 of the Rehabilitation Act ("Section 504") with Plaintiffs, in order to accommodate Plaintiffs' desire that their minor daughter not be exposed to chemical pesticides used by the School District at its schools, was an abuse of process and violated their substantive due process rights under the Fourteenth Amendment and their First Amendment rights to free speech. Before the Court is Defendants' Motion for Summary Judgment. For the reasons which follow, Defendants' Motion is granted.

I. BACKGROUND

Plaintiffs John and Gail Sutton, and their minor daughter Danielle, lived in the School District between November 1998 and

January 2002. (Danielle Sutton Dep. at 16, Gail Sutton Dep. at 43.) All three of the Suttons suffer from multiple chemical sensitivities and Danielle is sensitive to pesticides. (Pls.' Mem. at 2, Gail Sutton Dep. at 17.) In February of 2000, the School District announced a plan to begin spraying pesticides on the playing fields at School District schools in the spring of that year. (Danielle Sutton Dep. at 42, Gail Sutton Dep. at 19-21, Pls.' Ex. A.) The School Board voted to approve the spraying plan during a March 2000 School Board meeting. (Danielle Sutton Dep. at 40.) John, Gail and Danielle Sutton protested the use of pesticides at that School Board meeting by standing in front of the building where the meeting took place with signs protesting the use of pesticides. (Id.) They also gathered signatures on petitions in opposition to the School District's plan to spray pesticides. (Danielle Sutton Dep. at 42, Pls.' Ex. B.) The School Board approved the spraying plan and the School District began to spray in the spring of 2000, while Danielle Sutton was in the eighth grade. (Gail Sutton Dep. at 21.) Due to Danielle's sensitivity to pesticides, the Suttons asked her gym teacher to keep her inside if there was spraying. (Gail Sutton Dep. at 22.)

Danielle Sutton was assigned to start ninth grade at East High School beginning in the fall of 2000. (Gail Sutton Dep. at 24.) East High School is located in a rural area across the street from a working farm. During the summer of 2000, prior to Danielle's

entering ninth grade, the Suttons asked the School District for a Section 504 Service Agreement to allow her to fulfill her gym requirement away from the school. (Gail Sutton Dep. at 25.) They also asked that the school not be sprayed with pesticides and that Danielle be allowed to transfer to B. Reed Henderson ("Henderson") High School, which is located in a more urban area. (Gail Sutton Dep. at 25-26.) On August 15, 2000, Dr. William Duffy, the School District's Assistant Director of Pupil Services and Special Education, sent a letter to the Suttons asking that they provide a medical evaluation and diagnosis for Danielle for use in determining her eligibility for a Section 504 Service Agreement. (Defs.' Ex. F at S-14.) Danielle's doctor, Marc Cotler, M.D., sent a letter to the School District on August 23, 2000, stating that Danielle has a "very strong history of adverse reactions to numerous environmental chemicals (cleaning agents, etc.) and pesticides. These reactions have ranged from migraine headaches to sinusitis to airway obstruction." (Defs.' Ex. F at S-16.) Dr. Cotler strongly recommended that Danielle:

> not have gym on lawns that have been sprayed with pesticides nor to be at school on days where the farm across the street has freshly applied pesticides to their fields. It is my medical opinion that many of Danielle's symptoms and signs of multiple chemical sensitivity are precipitated by agents in the sprays and antigens that are present in aerosol sprays and odors. Although many people do not have problems with chemicals in everyday exposure, such is not the case with Danielle, and our attention to her special

> needs should allow her to participate in school and school activities.

(Defs.' Ex. F at S-16, emphasis in original.)

On August 22, 2000, John Sutton wrote a letter to the Principal of East High School, Dr. Lee McFadden, asking to be notified of any and all use of pesticides, herbicides, insecticides, and fungicides used at the school. (Defs.' Ex. F at S-15.) On August 25, 2000, John Sutton sent a letter to Dr. McFadden demanding certain accommodations because of Danielle's multiple chemical sensitivity:

> Our daughter is not permitted to go out on the lawn/fields for gym, picnics or any activity because of the pesticides. (Other than an emergency reason for being outside) She can sit in the library or in some classroom but she is not allowed on those fields/lawn. Call it 504 or excused from gym or whatever you call it.
>
> Our daughter can take indoor gym if you use a ball not used outdoors, if there is no shallack [sic] odor noticeable to us and if substantial time has elapsed since the last pesticiding [sic] on the fields so that there is no "tracking" in of pesticides.
>
> Multiple Chemical Sensitivity is a disability under 504.
> OCR can verify this.
> So are allergies. So is hypersensitivity to pesticides which is MCS.
> We wanted to find out if our daughter was in any classroom that had been termited [sic].
> (and when it was termited [sic])
> We wanted our daughter to be able to have a safe bus stops [sic] the same stop she had last year; for safety reasons and for chemical sensitivity reasons.

> Will you or will you not do a 504 service agreement or an independent education program agreement and/or independent contract?
>
> We ask that the district stop using pesticides on fields. We have filed with OCR regarding this matter. (of the district using pesticides on the fields) Rather than belabor the issue, we will take the reimbursement of summer school issue to court.
>
> There is a significant half life for pesticides. They do not just "disappear". They persist in the soil for some time.
>
> Danielle is not allowed to sit on the gym floor. She is not allowed to wear pinnies that we did not personally purchase.
>
> She is not allowed to use exercise machines or equipment or lift weights.

(Defs.' Ex. F at S-18.)

On August 28, 2000, Karen Smith, the school nurse at East High School, sent a memo to teachers and administrators at East High School, including Dr. McFadden, stating that "Danielle has a history of severe adverse reactions to numerous environmental chemicals and pesticides" and that she "may NOT go outside for physical education or other activities in grass covered areas." (Defs.' Ex. F at S-19.) Also on August 28, 2000, the School District proposed a Section 504 Service Agreement for Danielle Sutton. The proposed Service Agreement stated that Danielle has been diagnosed with multiple chemical sensitivity, and has "a history of adverse reactions to numerous environmental chemicals. These reactions, according to Dr. Cotler, have ranged from migrane

[sic] headaches to sinusitis to airway obstruction." (Defs.' Ex. F at S-20.) The proposed Service Agreement further stated that the School District would provide the following accommodations:

> (1) Danielle will have access to the school nurse if any symptoms are manifested and the school nurse will contact Danielle's parents.
> (2) Danielle will not participate in outdoor physical education activities, instead Danielle will have adaptive PE. This will consist of appropriate activities in the Fitness Room.
> (3) Danielle will be provided with a chair during those times when sitting on the gym floor is necessary.
> (4) During fire drills or emergency evacuations, Danielle will report to the school nurse who is located in the parking lot outside the main entrance of East High School.
> (5) The district will notify Mr. and Mrs. Sutton within 48-72 hours prior to the district spraying herbicides or pesticides at East High School.
> (6) The district is willing to offer Danielle Sutton placement at B. Reed Henderson High School. The location of this high school is in an urban area of West Chester, there are no farms or fields adjacent to the campus.
> (7) The district will provide Danielle with balls and other equipment that have not been used outside.

(Defs.' Ex. F at S-20.) The proposed Service Agreement also states that, in the event of an emergency, the school nurse "will contact Danielle's parents, if symptoms are severe enough the school nurse will call 911." (Def.'s Ex. F at S-20.)

On September 6, 2000, John Sutton sent a letter to the School District objecting to the proposed Service Agreement for the following reasons: the Suttons would not allow Danielle to use

exercise equipment because of a previous injury and wanted to substitute gym class with dance; Danielle would look like an outcast if she sat in a chair during gym; there was no guarantee that balls used indoors had no pesticides on them; Danielle would not be permitted to go into the gym unless the school could guarantee that no pesticide residues had been tracked in to the gym; the Suttons wanted Danielle's bus stop to be moved; and the Suttons would not agree to allow the school nurse to call 911 in the event of an emergency because they do not use the local hospital. (Defs.' Ex. F at S-26.) In response, the School District proposed two modified Service Agreements, one for East High School and one which permitted her to transfer to Henderson High School. The proposed modified Service Agreement for Henderson High School stated that the School District would provide the following accommodations and emergency procedures:

> 1. The WSACD is giving Danielle an exception to attend B. Reed [sic] High School.
> 2. Danielle will not participate in outdoor physical education activities; instead she will have an adaptive physical education program. This will consist of appropriate activities in the Fitness Room. This will include directed activities using a Nautilus Machine, Treadmill, Exercycle, stretching exercises and pushups. These activities will be appropriate for a student in the ninth grade.
> 3. Danielle will be provided with balls and other equipment that has [sic] been prepared for use inside and has [sic] not been used outside.
> 4. During emergency evacuations of the

> building (e.g. fire drills, etc.), Danielle will report to the school nurse who is located outside the west entrance to B. Reed Henderson High School in the parking lot.
> 5. The WCASD will notify Danielle's parents within 48 to 72 hours prior to the spraying of herbicides or pesticides by school district personnel or district representatives.
>
> The following procedures will be followed in the event of a medical emergency:
>
> 1. Danielle will have access to the school nurse if any symptoms are manifested.
> 2. The school nurse will access Danielle and contact her parents. In addition, the nurse will follow all established School District Guideline [sic] regarding emergencies. This shall include calling 911 and administering epinephrine through an "epipen."

(Defs.' Ex. F at S-27.) The proposed modified Service Agreement for East High School is identical, except with respect to emergency evacuations. (Defs.' Ex. F at S-28.) The East High School Service Agreement stated that "During emergency evacuations of the building (e.g. fire drills, etc.), Danielle will report to the school nurse who is located outside the main entrance in the parking lot." (Defs.' Ex. F at S-28.)

After receiving the proposed modified Service Agreements, the Suttons withdrew their request for a Section 504 Service Agreement. They contend that they withdrew their request because they didn't want to label their daughter as disabled and because the adaptive physical education provided in the proposed modified Service

Agreements was at odds with the School District's practice of allowing parents a wide range of physical activities to choose from. (Gail Sutton Dep. at 26, Pls.' Mem. at 3, Pls.' Ex. D.) They also disagreed with the provision that the school nurse would be authorized to inject Danielle with epinephrine. (Pls.' Mem. at 4, Pls.' Ex. F.) The Suttons claimed that the use of epinephrine would be medically inappropriate for Danielle and provided the School District with a report from her doctor, Marc Cotler, M.D., to that effect. (Pls.' Mem. at 4, Pls.' Ex. G.)

On September 14, 2000, after they withdrew their request for a Section 504 Service Agreement, the Suttons sent a note to Dr. McFadden stating that "Danielle is not to take gym or go outside on the fields or go to health/fitness room. Please send her to the library." (Defs.' Ex. F at S-31.) On October 2, 2000, the Suttons refused to fill out a Student Emergency Card because they insisted that no medication be given to Danielle, including emergency medication. (Defs.' Ex. F at S-33.) Gail Sutton told Karen Smith that she believed that Dr. Duffy was "'practicing medicine without a license' by putting those emergency measures into the 504 Plan." (Defs.' Ex. F at S-33.) On October 10, 2000, John Sutton sent a note to Dr. Duffy and Mrs. Payne, then the School District's Section 504 coordinator, stating that:

> We have repeatedly told you we do not want your 504 plan because it is inadequate and also attempts to "practice medicine without a license." We have a workable more acceptable

> agreement with the principal of the high school. It is very peculiar that at first you refused to accept the idea of a 504 plan and then you try to force us to take it when we no longer need or want it. Pesticides are poisons they are not allergies. Your medical reference in the plan is, also, practicing incorrect medicine without a license.

(Defs.' Ex. F at S-34.)

Because the Suttons continued to ask for accommodations for Danielle after they withdrew their request for a Section 504 Service Agreement, and complained to the Office of Civil Rights that a Section 504 Service Agreement was not in place, the School District submitted the matter for an administrative due process hearing. (Defs.' Ex. D at 12.) The hearing was held on November 20, 2000. (Defs.' Ex. E.) The Suttons objected to the hearing, but participated in it by cross-examining witnesses called by the School District. (See Defs.' Ex. E.) In a Decision issued on December 3, 2000, the Special Education Hearing Officer found that there was no dispute that Danielle has multiple chemical sensitivities. (Defs.' Ex. D at 10.) The Hearing Officer also found that the Section 504 Service Agreement offered by the School District is appropriate and meets the test of reasonableness. (Defs.' Ex. D at 13.) The Hearing Officer specifically stated that he did not think that the school nurse would use an epipen on Danielle "capriciously." (Defs.' Ex. D at 14.) He also stated that the Service Agreement would give Danielle the opportunity to attend a different high school that was not surrounded by fields

and does not have a working farm across the street. (Defs.' Ex. D at 13.) The Suttons continued to object to the implementation of the proposed Service Agreement, but sought to have Danielle transferred out of East High School. (Pls.' Mem. at 6, Pls.' Exs. H-L.)

The School District informed the Suttons that the Section 504 Service Agreement would be implemented at East High School on February 27, 2001, following the expiration of the 60 day period to appeal the decision of the Hearing Officer. (Pls.' Ex. J.) The Suttons did not appeal the decision of the Hearing Officer. On March 28, 2001, the School District denied the Suttons' request to transfer Danielle to Henderson High School because there was a valid Section 504 Agreement in place at East High School and because "it would not follow educationally sound practice to uproot Danielle and have her start anew." (Pls.' Ex. L.) Dr. Duffy stated in his March 28, 2001 letter to the Suttons that the 504 team would consider transferring Danielle to Henderson prior to the 2001-2002 school year. (Pls.' Ex. L.) In April 2001, the Suttons withdrew Danielle from East High School in order to home school her because she: "could not transfer to Henderson, the farm was about to spray toxic pesticides and the school was about to spray toxic pesticides and the forced 504 was being implemented allowing the nurse to inject [Danielle] with epinephrine. . . ." (John Sutton Aff. ¶ 11.)

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary

judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." Boykins v. Lucent Technologies, Inc., 78 F. Supp. 2d 402, 407 (E.D. Pa. 2000). Indeed, evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993)). The Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

III. DISCUSSION

John and Gail Sutton have asserted causes of action on behalf of themselves and on behalf of Danielle Sutton, alleging abuse of process under the Rehabilitation Act and the Americans with Disabilities Act ("ADA"), violation of their civil and fundamental rights, retaliation and harassment in violation of the First Amendment, intentional infliction of emotional distress, abuse of power, and conspiracy to violate Danielle's civil rights in violation of 42 U.S.C. § 1985. All of these causes of action are based upon the School District's request for a due process hearing

in order to resolve its dispute with the Suttons regarding the proposed Section 504 Service Agreement, and implementation of the Section 504 Service Agreement after it was approved by the Hearing Officer. Defendants have moved for summary judgment on all remaining counts of the Amended Complaint.[1]

A. Counts I and VI

In Counts I and VI of the Amended Complaint, John and Gail Sutton claim that the School District willfully abused process, and abused its power and authority, in violation of Section 504 and the ADA, by forcing them into a Section 504 Service Agreement.[2] Count I is brought by John and Gail Sutton on their own behalf, Count VI is brought by John and Gail Sutton on behalf of Danielle Sutton. Defendants argue that the School District is entitled to summary judgment on Counts I and VI of the Amended Complaint because the evidence of record does not support a claim for abuse of process pursuant to either the Section 504 or the ADA. They also argue that the School District is entitled to summary judgment on Count I of the Amended Complaint because this claim is barred by the statute of limitations.

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[1]Count IV was previously dismissed pursuant to the Court's Order dated November 26, 2003 granting Defendants' Motion to Dismiss.

[2]The Suttons do not explain the legal basis of their claim for abuse of power and authority. The Amended Complaint states that the School District abused its power and authority by abusing process. (Am. Compl. ¶ 78.) Accordingly, Count VI is treated as though it were brought as a claim for abuse of process.

1. Abuse of Process

The Suttons contend that the School District abused process in violation of Section 504 and the ADA by initiating the due process hearing and forcing the Section 504 Service Agreement on them. "An abuse of process claim is concerned with the perversion of a process after it is issued." Reinsmith v. Borough of Bernville, No.Civ.A. 03-1513, 2003 WL 22999211, at *7 (E.D. Pa. Dec. 16, 2003) (citing McGee v. Feege, 517 Pa. 247, 535 A.2d 1020, 1023 (Pa. 1987)). A claim for abuse of process exists where the process is "used 'to effectuate an extortion demand, or to cause the surrender of a legal right, or is used in any other way not so intended by proper use of the process.'" Id. (citing Brown v. Johnston, 675 F. Supp. 287, 290 (W.D. Pa. 1987)). The Suttons have not specified the process which they claim was abused in this case.[3]

The School District maintains that there was no abuse of process in this case because its request for a due process hearing was made pursuant to federal and state law. The regulations promulgated with respect to Section 504 require school districts to provide, in connection with actions taken to accommodate students with disabilities, "a system of procedural safeguards that includes

[3]Plaintiffs contend that they can assert their claims for abuse of process pursuant to the Rehabilitation Act and the ADA. They have not, however, provided any support for this contention and the Court can find none. Consequently, the Court has treated Plaintiffs' claims for abuse of process as though they are asserted pursuant to Pennsylvania common law.

notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure." 34 C.F.R. § 104.36. Either the School District, or the parents, may initiate such an impartial hearing for "any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child)." 34 C.F.R. § 300.507(a)(1). The Pennsylvania Education Code similarly permits a school district to request a due process hearing in the event that a school district and a student's parents do not agree to accommodations proposed by the school district:

> If the parents and the school district cannot agree as to the related aids, services and accommodations that should or should no longer be provided to the protected handicapped student, either party may use the procedural safeguard system under § 15.8 (relating to procedural safeguards) to resolve the dispute, and the school district shall notify parents in writing of their rights in this regard.

22 Pa. Code § 15.7(b).

The Suttons acknowledge that federal and state law permit the School District to request a due process hearing. They argue, however, that the School District did not have the right to go forward with that hearing once they objected to it, and that the School District's insistence on holding the hearing, and

implementation of the Section 504 Service Agreement approved as appropriate and reasonable by the Hearing Officer, constitute abuse of process. The Suttons have been unable to point to any authority for the proposition that the School District may not hold a due process hearing over their objection. They rely solely on the requirement, described in 22 Pa. Code § 15.5, that a school district send written notice to a child's parents if it believes that the child should be identified as a protected handicapped student, which must notify the parents of "[t]he requirement that the parents agree to the student's identification as a protected handicapped student and execute a service agreement before the school district will provide the proposed related aids, services or accommodations." 22 Pa. Code § 15.5(b)(7). The Pennsylvania Education Code does not contain any requirement that the student's parents agree to participate voluntarily in a due process hearing, but provides that the hearing officer may decide <u>any</u> dispute concerning the provision of accommodations to the student at a due process hearing requested by either the parents <u>or</u> the school district:

> (d) Formal due process hearing. If the matters raised by the school district or parents are not resolved at the informal conference, the district or parents may submit a request for a hearing. The hearing shall be held before an impartial hearing officer and shall be governed by § 14.64(a)--(l), (n) and (o) (relating to impartial due process hearings) if no issues under Chapter 14 (relating to special education services and programs) are

> raised for decision in the hearing by the parents, school district or hearing officer. If issues under Chapter 14 are raised for decision in the hearing by the parents, school district or hearing officer, an appeal from the hearing officer's decision shall be governed also by § 14.64(m).
>
> (e) Stay pending judicial appeals. If, within 60 calendar days of the completion of the administrative due process proceedings under this chapter, an appeal or original jurisdiction action is filed in State or Federal Court, the administrative order shall be stayed pending the completion of the judicial proceedings, unless the parents and school district agree otherwise.

22 Pa. Code § 15.8(d), (e). The Suttons did not appeal the decision of the Hearing Officer or file suit in state or federal court for review of that decision in accordance with Section 15.8. Instead, they allowed the Hearing Officer's decision to go into effect, withdrew their daughter from school, waited more than two years, and then sued for monetary damages.

Assuming, *arguendo*, that the School District's request for a due process hearing and implementation of the approved Section 504 Service Agreement are "process", the Court finds that there is no evidence on the record of this Motion for Summary Judgment that the School District abused process by using it in any way not intended as proper use. To the contrary, the School District complied with the procedural safeguards required by the Rehabilitation Act and the Pennsylvania Education Code by requesting a due process hearing when the Suttons disagreed with the accommodations it proposed, and

by implementing the Section 504 Service Agreement approved by the Hearing Officer after the Suttons failed to appeal the Hearing Officer's decision in accordance with Pennsylvania law. Accordingly, Plaintiffs' claims for abuse of process fail on the merits.

2. Statute of Limitations

Defendants also argue that Count I, the Suttons' cause of action for abuse of process, is barred by the statute of limitations. The Suttons argue that their claim for abuse of process arises directly under the ADA and the Rehabilitation Act and, therefore, the two year Pennsylvania statute of limitations for personal injury actions applies. See Saylor v. Ridge, 989 F. Supp. 680, 686 (E.D. Pa. 1998) ("In this district, it has repeatedly been held that Pennsylvania's two year statute of limitations for personal injury claims governs claims under both the Rehabilitation Act and Title II of the ADA.") Pennsylvania law also provides a two year statute of limitations for actions for abuse of process arising under common law. See 42 Pa. Cons. Stat. Ann. § 5524(1). The statute of limitations begins to run "as soon as the right to institute and maintain a suit arises." Pocono Int'l Raceway, Inc. v. Pocono Produce, 468 A.2d 468, 471 (Pa. 1983). The statute is not tolled by lack of knowledge, mistake or misunderstanding, "even though a person may not discover his injury until it is too late to take advantage of the appropriate remedy,"

unless the injured person is unable, through the exercise of due diligence, to ascertain his injury and its cause Id.

Defendants argue that the events giving rise to Plaintiffs' cause of action for abuse of process all occurred more than two years prior to the filing of the Complaint in this action on May 12, 2003. Defendants point out that the Suttons requested a Section 504 Service Agreement for Danielle during the Summer of 2000; the School District first proposed a Section 504 Service Agreement on August 28, 2000; John Sutton objected to the proposal on September 6, 2000; the School District proposed two modified Service Agreements; the Suttons withdrew their request for a Section 504 Service Agreement in September 2000; the Suttons continued to ask for accommodations for Danielle in September 2000; the School District sought a due process hearing which was held on November 20, 2000; the Hearing Officer issued his decision on December 3, 2000, finding that the proposed modified Service Agreement was appropriate and reasonable for Danielle; the Service Agreement was implemented on February 27, 2001, after the Suttons' time to appeal that decision expired; the Suttons asked to have Danielle transferred to Henderson High School on March 28, 2001 and the School District denied their request; and the Suttons withdrew Danielle from East High School in April 2001.

Plaintiffs argue that the School Districts' actions with respect to Danielle constitute a continuing violation and,

therefore, that their claim for abuse of process is not barred by the statute of limitations. The United States Court of Appeals for the Third Circuit ("Third Circuit") explained the continuing violations doctrine in Cowell v. Palmer Township, 263 F.3d 286 (3d Cir. 2001), as an "equitable exception to the timely filing requirement" so that: "'when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred.'" Id. at 292 (citing Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am., 927 F.2d 1283, 1295 (3d Cir. 1991).

The Suttons argue that the abuse of process continued until the fall of 2001 because, once the Section 504 Service Agreement approved by the Hearing Officer was implemented on February 27, 2001, it continued to be in effect until September 8, 2001. (See Defs.' Ex. F at S-27 and S-28.) Consequently, they could not leave their daughter in school during the remainder of the spring 2001 term, or send her to summer school during the summer of 2001, because she would have been subject to the administration of epinephrine by the school nurse. (Pls.' Mem. at 21-22.) They also claim that the abuse of process continued until July 2002, when the School District refused to transfer Danielle's records to Upper Merion School District. Plaintiffs have submitted a July 8, 2002

letter sent by Gina K. DePietro, counsel for the School District, to the Suttons, stating that the School District could not forward Danielle's records to Upper Merion School District because Danielle was not registered to attend school there. (Pls.' Ex. P-22.)

Defendants argue that the statute of limitations bars Count I because Plaintiffs have submitted no evidence of any new abuse of process which occurred within the two years prior to the filing of the Complaint. The Third Circuit has instructed that courts should consider the following factors in weighing the application of the continuing violations doctrine:

> (1) subject matter--whether the violations constitute the same type of discrimination, tending to connect them in a continuing violation; (2) frequency--whether the acts are recurring or more in the nature of isolated incidents; and (3) degree of permanence--whether the act had a degree of permanence which should trigger the plaintiff's awareness of and duty to assert his/her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate.

Id. (citing Brenner, 927 F.2d at 755 n. 9). The focus of the continuing violations theory is on affirmative acts by the defendant. Id. at 293 "A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." Ocean Acres Ltd. v. Dare County Bd. of Health, 707 F.2d 103, 106 (4th Cir. 1983) (citation omitted). With the exception of the July 2002 letter, the continuing violations relied on by Plaintiffs are in the nature of continual ill effects from

the alleged original violation, which, viewing the evidence in the light most favorable to Plaintiffs, concluded, at the very latest, in April 2001, when the Suttons withdrew Danielle from East High School and commenced home schooling. The Court further finds that, even if the July 2002 letter were considered an abuse of process, or some other violation of the Suttons' constitutional or statutory rights, it does not constitute the same type of violation as the other alleged abuses and is in the nature of an isolated incident. Accordingly, the Court finds that Count I of the Amended Complaint is barred by the two year statute of limitations for claims brought pursuant to Section 504 and the ADA.

For the reasons stated above, the Court grants Defendants' Motion for Summary Judgment with respect to Counts I and VI of the Amended Complaint.

B. Counts II and VII

In Counts II and VII of the Amended Complaint, John and Gail Sutton claim that the School District violated their civil rights and fundamental rights, and Danielle Sutton's civil rights and fundamental rights, when they were forced into a Section 504 Service Agreement to which they objected. Count II is brought by John and Gail Sutton on their own behalf, Count VII is brought by John and Gail Sutton on behalf of Danielle Sutton.

In Count VII, the Suttons claim that the School District has violated Danielle's fundamental right to a free and appropriate

public education. Defendants argue that the School District is entitled to summary judgment on Count VII because Plaintiffs have not identified any fundamental right of Danielle's which was violated by the School District. Although the Supreme Court has recognized that the right to an education is important, it has not been recognized as a fundamental right explicitly protected by the Constitution. Papsan v. Allain, 478 U.S. 265, 283-84 (1986) ("stating that the Supreme Court has recognized the importance of public education but noted that education 'is not among the rights afforded explicit protection under our Federal Constitution.'") (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 36 (1973)); see also Pyler v. Doe, 457 U.S. 202, 221-23 (1982). As Plaintiffs have identified no fundamental right of Danielle Sutton which has been violated by the School District, the Court finds that the School District is entitled to judgment as a matter of law on this claim and Defendants' Motion for Summary Judgment is granted with respect to Count VII.

In Count II, John and Gail Sutton allege that the School District violated their fundamental right to make crucial decisions in connection with raising their child. "The Supreme Court has recognized a 'fundamental liberty interest of natural parents in the care, custody, and management of their child.'" Miller v. City of Philadelphia, 174 F.3d 368, 373 (3d Cir. 1998) (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982)). Consequently, Count II is

treated as a Section 1983 claim for violation of the substantive due process clause of the Fourteenth Amendment.

Defendants argue that they are entitled to entry of summary judgment in favor of the School District on Count II of the Amended Complaint because there is no evidence to support a violation of the Fourteenth Amendment right to substantive due process in this case. They also argue that this claim is barred by the statute of limitations.

1. Substantive due process

Defendants argue that the School District is entitled to summary judgment on Count II of the Amended Complaint because the Suttons have failed to present evidence that their substantive due process rights were violated in this case. "To generate liability" for a violation of Plaintiffs' substantive due process rights under the Fourteenth Amendment, the School District's actions "must be so ill-conceived or malicious that [they] 'shock[] the conscience.'" Miller, 174 F.3d at 375 (citing County of Sacramento v. Lewis, 528 U.S. 833, 846 (1998)). Negligence is not sufficient for the imposition of liability under this standard. Id. (citing Lewis, 523 U.S. at 849). The Supreme Court has explained that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." Lewis, 523 U.S. at 849 (citing Daniels v. Williams, 474 U.S. 328, 331 (1986)). The School District argues

that it is entitled to summary judgment on Count II because there is no evidence that it did anything which "shocks the conscience." The School District maintains that, faced with conflicting requests from the Suttons, it requested a due process hearing as permitted by both the regulations promulgated in connection with Section 504 and by the Pennsylvania Education Code. The Hearing Officer concluded that the School District had offered appropriate accommodations to Danielle. Since the Suttons did not appeal the Hearing Officer's decision, or file suit in state or federal court for review of that decision in accordance with 22 Pa. Code § 15.8(d), the School District implemented the Service Agreement.

The Suttons maintain that the School District's actions deprived them of a free appropriate public education for Danielle because they were forced to take Danielle out of the School District and educate her themselves. They also contend that, because they were forced to educate Danielle themselves, she was unable to graduate from the 9th grade and has been unable to obtain sufficient credits to advance her high school education. (Pls.' Resp. at 24.)

The Court finds that School District's actions in this case complied with all relevant state and federal law. The Suttons requested accommodations for Danielle but objected to the imposition of a Section 504 Service Agreement. The School District could not provide the requested range of accommodations without a

Service Agreement. See 22 Pa. Code § 15.5(b)(7). State and federal law authorized the School District to request a due process hearing to resolve the dispute. See 22 Pa. Code §§ 15.7(b), 15.8(d); 34 C.F.R. §§ 300.506(a), 300.507. The Hearing Officer found the Service Agreement, including the physical education and emergency administration of epinephrine components, to be appropriate and reasonable for Danielle. The Suttons were not forced to enter into the Service Agreement after the Hearing Officer's decision was issued, but were given an opportunity, in accordance with the Pennsylvania Education Code, to appeal that decision in an administrative proceeding or in state or federal court. They chose not to do so and, instead, withdrew Danielle from school. The Court finds that the Suttons have submitted no evidence that the School District's implementation of the Service Agreement, after the Suttons failed to appeal said decision, "shocks the conscience." Accordingly, the Court finds that there is no evidence on the record of this Motion for Summary Judgment that the School District violated the Suttons' Fourteenth Amendment substantive due process rights.[4]

[4]The School District also argues that it is entitled to summary judgment on Count II of the Amended Complaint because the Suttons have not proved the existence of a governmental policy, practice or custom which caused the alleged substantive due process violation in this case in accordance with Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). As the Court has found that there is no evidence on the record of this Motion that the School District's actions violated the Suttons' substantive due process rights under the Fourteenth Amendment, it need not reach this

2. Statute of limitations

The School District also argues that Count II is barred by the statute of limitations. The Courts apply the state's statute of limitations for personal injury actions to actions brought pursuant to Section 1983. See Montgomery v. De Simone, 159 F.3d 120, 126 n. 4 (3d Cir. 1998) (citing Wilson v. Garcia, 471 U.S. 261, 276 (1985)). The statute of limitations for personal injury actions in Pennsylvania is two years. Id. Federal law governs the accrual of § 1983 claims. Id. Under federal law, "'the limitations period begins to run from the time when the plaintiff knows or has reason to know of the injury which is the basis of the section 1983 action.'" Id. (quoting Gently v. Resolution Trust Corp., 937 F.2d 899, 919 (3d Cir. 1991)).

Defendants argue that, as with Count I, the events giving rise to Plaintiffs' cause of action for violation of their civil rights/fundamental rights all occurred more than two years prior to the filing of the Complaint in this action on May 12, 2003. Plaintiffs argue, as they did with respect to Count I, that their claim is not barred by the statute of limitations because the School District's actions constitute a continuing violation that continued until either the expiration of the Section 504 Service Agreement on September 8, 2001 or the issuance of the letter of July 8, 2002. The Court finds, for the reasons stated in Section

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argument.

III.A.2., above, that the Suttons' claim for violation of their civil rights and fundamental rights is barred by the statute of limitations.

For the reasons stated above, the Court grants Defendants' Motion for Summary Judgment with respect to Counts II and VII of the Amended Complaint.

C. Counts III and VIII

In Counts III and VIII, John and Gail Sutton allege that the individual Defendants retaliated against them, and against Danielle, and harassed them, and Danielle, for their exercise of their First Amendment rights to protest the School District's use of pesticides.[5] The Suttons claim that the individual Defendants retaliated against them, and harassed them, by intensifying the use of pesticides, forcing them into a Section 504 Service Agreement, and by stigmatizing Danielle as disabled. The individual Defendants argue that they are entitled to summary judgment on Counts III and VIII because the Suttons have failed to present evidence supporting a claim for violation of their First Amendment rights. They have also moved for summary judgment on Count III on the grounds that this claim is barred by the statute of

[5]Although the Amended Complaint appears to assert a claim directly under the First Amendment, since Plaintiffs cannot bring a claim directly under the First Amendment, the Court has treated this claim as though it were asserted pursuant to 42 U.S.C. § 1983. See Smith v. School Dist. of Philadelphia, 112 F. Supp. 2d 417, 430 (E.D. Pa. 2000).

limitations.

1. The First Amendment

Defendants argue that the individual Defendants are entitled to summary judgment on Counts III and VIII because Plaintiffs have failed to produce sufficient evidence to create a genuine issue of material fact with respect to their claims that they have been subjected to harassment and retaliation in violation of their First Amendment rights. "To prevail on a First Amendment retaliation claim, a plaintiff must prove that: (1) he/she engaged in protected activity; (2) the government responded with retaliation and (3) the protected activity was the cause of the government's retaliation." Grimm v. Borough of Norristown, 226 F. Supp. 2d 606, 636 (E.D. Pa. 2002). Once Plaintiffs have shown that they engaged in protected activity, and that the protected activity was a substantial or motivating cause of Defendants' decision to take action, the burden shifts to Defendants to establish that the same action would have taken place even in the absence of Plaintiffs' protected conduct. Id. at 636-37.

The Suttons contend that the individual Defendants committed the following acts in retaliation and harassment for their exercise of their First Amendment rights: (a) intensified their use of pesticides; (b) forced the Suttons into a Section 504 Service Agreement compelling inappropriate gym activity and the use of epinephrine; (c) forced the Suttons to stigmatize Danielle as

disabled before allowing her to transfer to Henderson High School; and (d) refused to provide Danielle with the proper credits so that she could graduate from the 9th grade. (Pls.' Mem. at 32.)

Defendants concede that Plaintiffs' speech, protesting the School Board meeting where the use of pesticides was considered, and circulating petitions regarding the School Districts' use of pesticides, was protected activity. They argue, however, that there is no evidence that the allegedly retaliatory and harassing activity was motivated by the Suttons' protected speech.

Plaintiffs contend that the temporal proximity between their protected speech and Defendants' actions provides sufficient evidence to create a genuine issue of material fact regarding whether Defendants' actions were motivated by their speech. Plaintiffs rely on Jalil v. Avdel Corporation, 873 F.2d 701 (3d Cir. 1989), a Title VII action brought by an employee who had been dismissed two days after his employers received notice that he had filed a complaint with the EEOC. The Third Circuit determined that Jalil had established a causal connection between his protected activity and his dismissal because of the temporal proximity between the events. Id. at 708 ("He demonstrated the causal link between the two by the circumstance that the discharge followed rapidly, only two days later, upon Avdel's receipt of notice of Jalil's EEOC claim.") (citing Burrus v. United Tele. Co., 683 F.2d 339, 343 (10th Cir. 1982)). However, in this case, there is

temporal proximity sufficient to raise an inference of causation only between the Suttons' protected speech and the spraying of pesticides. The Sutton's picketed a School Board meeting in March 2000, one month after the School District announced it would consider spraying pesticides; the School District began spraying one month after the Sutton's picketed the School Board meeting. The due process hearing did not occur until eight months after the Suttons' protected activity; the Hearing Officer's decision occurred nine months after the protected activity; and the School District's implementation of the Section 504 Service Agreement occurred approximately eleven months after the Suttons picketed the School Board meeting.

Defendants specifically contest Plaintiffs' position that the School District intensified its use of pesticides as a result of their protected activity. Defendants have submitted the Affidavit of Dr. Elko, Superintendent of the School District, who states that the School District decided to use pesticides to reduce the potential for (1) human health hazards, (2) loss or damage to school structures and property, and (3) the spread of pests into the community, plant and animal populations; and (4) to enhance the quality of life for students and staff. (Defs.' Ex. H ¶ 5.) He also states that "[t]he decision to use pesticides has never been based on anything said or done by the Suttons." (Id. ¶ 6.) Moreover, there is no evidence on the record of this Motion that

the School District "intensified" spraying of pesticides as alleged by Plaintiffs. Indeed, there is no evidence that the School District did anything other than carry out a plan which had been announced prior to Plaintiffs' speech, for reasons having nothing to do with Plaintiffs' speech. Accordingly, the Court finds that the temporal proximity between Plaintiffs' protected speech and the spraying of pesticides by the School District is not, in itself, sufficient to create a genuine issue of material fact regarding the cause of Defendants' actions in this case.

Plaintiffs also contend that causation can be proven in this case through a pattern of antagonism. Plaintiffs rely on Robinson v. Southeastern Pennsylvania Transportation Authority, 982 F.2d 892 (3d Cir. 1993), in which the Third Circuit found that Robinson had established causation through a pattern of harassment and antagonism even though he had not established temporal proximity:

> The temporal proximity noted in other cases, see, e.g., Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989), cert. denied, 493 U.S. 1023, 110 S. Ct. 725, 107 L. Ed. 2d 745 (1990), is missing here and we might be hard pressed to uphold the trial judge's finding were it not for the intervening pattern of antagonism that SEPTA demonstrated. As the trial judge found, SEPTA subjected Robinson to a "constant barrage of written and verbal warnings ..., inaccurate point totalings, and disciplinary action, all of which occurred soon after plaintiff's initial complaints and continued until his discharge." The court could reasonably find that the initial series of events thus caused Robinson's and SEPTA's relationship to deteriorate, and set a pattern of behavior that SEPTA followed in retaliating

> against Robinson's later efforts at opposing the Title VII violations he perceived.

Id. at 895.

Plaintiffs argue that the following evidence establishes a pattern of antagonism sufficient to prove a causal connection between their speech and the individual Defendants' actions: (a) Defendants violated their own policy in attempting to force the use of epinephrine and inappropriate gym activity on Danielle; (b) Defendants violated the Pennsylvania Education Code and the Rehabilitation Act by forcing the Section 504 Service Agreement on them; (c) Defendants violated the Hearing Officer's decision by refusing to transfer Danielle; and (d) the Defendants have failed to transfer Danielle's credits, preventing her from graduating from 9th grade. Plaintiffs have submitted evidence that Dr. Duffy denied the Suttons' request to transfer Danielle to Henderson High School, which was an element of the Section 504 Service Agreement approved by the Hearing Officer. However, Plaintiffs have not submitted any evidence that any of the other individual Defendants took part in Dr. Duffy's decision not to allow Danielle to transfer. Plaintiffs also have not submitted any evidence that the individual Defendants violated any School District policy, the Pennsylvania Education Code or the Rehabilitation Act, or that they unjustifiably refused to transfer any school credits earned by Danielle. This evidence is not, therefore, sufficient to create a pattern of antagonism which would support a conclusion that the

individual Defendants retaliated against Plaintiffs or harassed them because of their protected activity. The Court finds, accordingly, that there is no evidence on the record of this Motion for Summary Judgment that any of the Defendants violated Plaintiffs' First Amendment rights by retaliating against them, or harassing them, for their protected activity.[6]

2. Statute of limitations

Defendants argue that the Sutton's claim, in Count III, for violation of their First Amendment rights is barred by the two year statute of limitations applicable to claims brought pursuant to Section 1983. Defendants argue that, as with Counts I and II, the events giving rise to Plaintiffs' cause of action all occurred more than two years prior to the filing of the Complaint in this action on May 12, 2003. Plaintiffs argue, as they did with respect to Counts I and II, that their claim is not barred by the statute of limitations because the harassment against them continued through the Summer of 2002, when the School District sent the letter of July 8, 2002 refusing to transfer Danielle's school records. They also allege that the retaliation/harassment continued in the fall of 2002 because Danielle was forced to repeat 10th grade in September 2002 because she did not have enough credits from East

[6]Defendants also argue that they are entitled to qualified immunity on Plaintiffs' First Amendment claims. As the Court has found that there is no evidence on the record of this Motion that the individual Defendants violated the Suttons' First Amendment rights, it need not reach this argument.

High School. The Court finds, for the reasons stated in Section III.A.2., above, that the Suttons' claim for retaliation/harassment in violation of their First Amendment rights is barred by the statute of limitations.

For the reasons stated above, the Court grants Defendants' Motion for Summary Judgment with respect to Counts III and VIII of the Amended Complaint.

D. Count V

In Count V, John and Gail Sutton allege that Dr. Duffy, Dr. McFadden and Karen Smith intentionally inflicted emotional distress on them by (a) using pesticides which caused the Suttons to fear for the health of their child; (b) forcing a Section 504 Service Agreement on them which would harm Danielle though inappropriate gym activities and the forced use of epinephrine; and (c) forcing the Suttons to withdraw Danielle from school. In order to succeed on a claim for intentional infliction of emotional distress under Pennsylvania common law, a plaintiff must show: "(1) conduct was extreme and outrageous; (2) conduct was intentional or reckless; (3) conduct caused emotional distress; and (4) the distress was severe." Tupper v. Haymond & Lundy, No.Civ.A. 00-3550, 2001 WL 936650, at *5 (E.D. Pa. Aug. 16, 2001) (citing Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273-74 (3d Cir. 1979); Ocasio V. Lehigh Valley Family Health Center, No.Civ.A. 00-CV-3555, 2000 U.S. Dist. Lexis 16014, at *10 (E.D. Pa. Nov. 6, 2000)). In order

to succeed on a common law claim for intentional infliction of emotional distress pursuant to Pennsylvania law, the Suttons have to provide medical evidence demonstrating that they suffered severe emotional distress. Id. (citing Kazatsky v. King David Memorial Park, Inc.,527 A.2d 988, 995 (Pa. 1987) (requiring evidence of medical treatment or medical confirmation)). "A plaintiff must either show that she obtained medical treatment for the distress, or provide expert medical testimony of the existence and severity of the alleged emotional distress." Id. (citing Tuman v. Genesis Assocs., 935 F. Supp. 1375, 1393 (E.D. Pa. 1996) ("Once defendant establishes that the plaintiff has no expert medical confirmation of the alleged injuries, plaintiff is burdened to produce such evidence to defeat summary judgment.")).

Defendants argue that they are entitled to summary judgment because Plaintiffs have submitted no medical evidence that they suffered any emotional distress as a result of Defendants' actions. Plaintiffs argue that, since they have brought a claim pursuant to Section 1983, they do not need to present medical evidence in order to recover damages for intentional infliction of emotional distress. Plaintiffs rely on Bolden v. SEPTA, 21 F.3d 29 (3d Cir. 1994). In Bolden, the United States Court of Appeals for the Third Circuit determined that plaintiffs need not present medical evidence in order to obtain damages for emotional distress in connection with a claim brought pursuant to Section 1983, as

opposed to a claim brought pursuant to state common law for intentional infliction of emotional distress. Id. at 34.

The Amended Complaint does not state whether the Suttons' claim for intentional infliction of emotional distress has been brought as a separate cause of action pursuant to Pennsylvania common law, or as a request for damages brought as part of one of their claims under Section 1983. As all Defendants are entitled to the entry of summary judgment in their favor on Plaintiffs' claims brought pursuant to Section 1983, to the extent that Count V states a claim for damages pursuant to Section 1983, Defendants' Motion for Summary Judgment is granted. To the extent that Count V purports to state a cause of action for intentional infliction of emotional distress pursuant to Pennsylvania common law, Defendants' Motion for Summary Judgment is granted with respect to Count V because the Suttons have no medical evidence of such emotional distress. Tupper, 2001 WL 936650, at *6 ("[w]ithout evidence of physical injury, medical treatment, or expert medical testimony to substantiate the claim, plaintiff cannot defeat the motion for summary judgment.") (citing Tuman, 935 F. Supp. at 1393).

E. Count IX

In Count IX of the Amended Complaint, John and Gail Sutton claim, on behalf of Danielle Sutton, that the individual Defendants conspired to violate Danielle's civil rights by implementing the Section 504 Service Agreement without her parents' consent;

refusing to transfer her to a different school; attempting to force her to use epinephrine; and attempting to force her to use weights. The Suttons assert this cause of action pursuant to 42 U.S.C. § 1985(3), which provides a private right of action against persons who conspire to violate the civil rights of another person. In order to succeed on a claim brought pursuant to Section 1985(3), Plaintiffs must establish the following elements:

> (1) a conspiracy; (2) for the purpose of depriving any person or class of person of equal protection of the laws or equal privileges and immunities; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. To satisfy the second element, Plaintiff must allege that the Defendants were motivated by some racial, or perhaps otherwise class-based, invidiously discriminatory animus.

Kelleher v. City of Reading, No.Civ.A. 01-3386, 2001 WL 1132401, at *2 (E.D. Pa. Sep. 21, 2001) (internal quotations and citations omitted). The individual Defendants argue that Plaintiffs have failed to produce evidence satisfying any of the elements of a Section 1985(3) action. They contend that Plaintiffs have submitted no evidence of a conspiracy or agreement to commit an unlawful act. See Gordon v. Lowell, 95 F. Supp. 2d 264, 270 (E.D. Pa. 2000) ("Proof of conspiracy, or an agreement to commit an unlawful act, is an essential element of claim under this section. An allegation of conspiracy is insufficient to sustain a cause of action under 42 U.S.C.A. § 1985; it is not enough to use the term

'conspiracy' without setting forth supporting facts that tend to show an unlawful agreement.") (citations omitted). Defendants also contend that officials of a public agency, such as officials and employees of the School District, cannot conspire with each other. Defendants rely on Aeillo v. County of Montgomery, No.Civ.A. 99-1543, 2000 WL 157154, in which Judge Buckwalter granted summary judgment in favor of employees of the Montgomery County Correctional Facility on claims that they had conspired to violate Aeillo's civil rights. Judge Buckwalter noted that "a public entity can act only through its officials. There can be no conspiracy among agents of a single entity, in this case the Montgomery County Correctional Facility." Id. at *6 (citations omitted). Defendants further argue that Plaintiffs have failed to identify Danielle's membership in a protected class or submitted any evidence of invidious discriminatory animus on the part of any of the Defendants. See Kelleher, 2001 WL 1132401, at *6 ("Plaintiff has not alleged the existence of a racial or otherwise class-based invidiously discriminatory animus, and in fact argues that such animus is not required. The failure to plead racial or otherwise class-based, invidiously discriminatory animus is fatal to a claim under § 1985(3).") (citation and footnote omitted). Defendants also argue that Plaintiffs have not established that Danielle was denied any right or privilege by their alleged actions.

Plaintiffs argue that the individual Defendants entered into a conspiracy to violate Danielle's rights under the Pennsylvania Education Code and the Rehabilitation Act by attempting to force inappropriate gym activity; attempting to force the use of epinephrine, and refusing to transfer Danielle to Henderson High School. They contend that the correspondence from the individual Defendants to the Suttons is evidence of the conspiracy. Plaintiffs also maintain that Danielle is a member of a protected class by nature of her handicap; that the correspondence shows invidious discriminatory animus; and that Danielle was injured because she was denied the right and privilege of attending a school in the West Chester Area School District and graduating from the 9th grade. The Court finds that the record on this Motion for Summary Judgment contains no evidence of an agreement to deprive Danielle of her civil rights by persons who are capable of conspiring with each other, and no evidence that any of the individual Defendants acted with "class-based, invidiously discriminatory animus." Defendants' Motion for Summary Judgment is, therefore, granted with respect to Count IX of the Amended Complaint.

IV. CONCLUSION

For the reasons stated above, the Court grants summary judgment in favor of the School District on Counts I, II, VI, and VII of the Amended Complaint, in favor of the individual Defendants

on Counts III, VIII and IX of the Amended Complaint, and in favor of Defendants Duffy, McFadden, and Smith on Count V of the Amended Complaint.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN and GAIL SUTTON, ET AL.	:	CIVIL ACTION
v.	:	
WEST CHESTER AREA SCHOOL DISTRICT, ET AL.	:	NO. 03-3061

ORDER

AND NOW, this 5th day of May, 2004, in consideration of Defendants' Motion for Summary Judgment (Docket No. 18), the papers filed in support thereof, Plaintiffs' response thereto, and the oral argument held on April 28, 2004, **IT IS HEREBY ORDERED** as follows:

1. Defendants' Motion for Leave to File a Reply Brief (Docket No. 22) is **GRANTED**. **IT IS FURTHER ORDERED** that the Clerk shall enter the Reply Brief attached to said Motion on the Docket.
2. Plaintiffs' "Motion to File a Response to Defendants' Reply Brief" (Docket No. 31) is **GRANTED**. **IT IS FURTHER ORDERED** that the Clerk shall enter the Response attached to said Motion on the Docket.

3. Defendants' Motion for Summary Judgment is **GRANTED**. It is further **ORDERED** that **JUDGMENT** is **ENTERED** on behalf of Defendants and against Plaintiffs. The Clerk of Court shall **CLOSE** this case for statistical purposes.

BY THE COURT:

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John R. Padova, J.